ORIGINAL

NO. 87-6177

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Texas capital-sentencing statute is unconstitutional for failing to require specific instruction regarding balancing of aggravating and mitigating circumstances and for failing to define some of the terms used in the special issues on punishment.

II. Whether the execution of a death sentenced inmate who has limited mental capacity but who was adjudged competent at trial violates the eighth amendment proscription against cruel and unusual punishment.

III. Whether Penry's confessions were voluntarily given and whether he knowingly relinquished his right against self-incrimination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONTINUED

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the district court's denial of habeas relief is attached to the petition as Appendix A. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). The unpublished opinion of the district court is attached to the petition as Appendix B. Penry v. Lynaugh No. L-86-89-CA (E.D. Tex. 1987).

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Penry."

JURISDICTION

Penry seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Penry relies on the fifth and eighth amendments to the Constitution. Also at issue here is the Texas statute which sets out the special issues at the punishment phase of a capital trial. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Penry pursuant to a judgment and sentence of the 258th Judicial District Court of Trinity County, Texas, in Cause No. 6572, styled The State of Texas v. Johnny Paul Penry. On November 7, 1979, Penry was indicted for the offense of capital murder of Pamela Carpenter while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty (SF XIII 1344).[2]

Penry's pretrial motions were heard on January 11, 1980 (SF III 28-83), including a motion for change of venue which was granted on that date (SF III 84-101). His pretrial motions were continued on February 29, 1980, and a hearing was held on his motions to suppress his confessions (SF IV). Detailed findings of fact and conclusions of law denying the motion to suppress were filed on March 25, 1980 (Tr. 94). An extensive hearing on Penry's challenge to his competency to stand trial was held before a jury on March 10-13, 1980 (SF V-VII), and the jury found him competent (SF VII 944-45).

[2]"Tr." refers to the transcript of Penry's state court proceedings located in Volume I. "SF" refers to the statement of facts, with reference made to the volume number typewritten on the bottom of the cover of each volume and page number as reflected in the lower right hand corner of each page. The appendices attached to Penry's petition are referred to as "A" and "B" with the appropriate page numbers following.

Trial began on March 24, 1980, and on April 1, 1980, the jury found Penry guilty of the capital offense (Tr. 111; SF 2533). On April 1, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1987) (Tr. 118-119; SF XVII 2698-2703).

Penry appealed this conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed on January 9, 1985. Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985) (en banc). Rehearing was denied on May 2, 1985. Certiorari was denied on January 13, 1986. Penry v. Texas, ___ U.S. ___, 106 S.Ct. 834 (1986).

Penry was formally sentenced to be executed before sunrise on May 7, 1986. he filed an application pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 §2 (Vernon Supp. 1984) on April 10, 1986. The state convicting court recommended denial on April 25, 1986. The Texas Court of Criminal Appeals denied the application and motion for stay of execution on May 5, 1986. Ex parte Penry, Application No. 15918-01.

On May 5, 1986, Penry filed an application for writ of habeas corpus and a motion for stay of execution in the United States District Court for the Eastern District of Texas Lufkin Division. Penry v. McCotter, No. L-86-89-CA. United States District Judge William M. Steger entered a stay of execution on May 6, 1986. An order denying all habeas relief was entered on April 28, 1987, and the stay of execution was vacated. The district court granted Penry's request for certificate of probable cause to appeal, and on November 25, 1987, the Court of Appeals for the Fifth Circuit affirmed. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Rehearing and rehearing en banc were denied on December 23, 1987.

B. Statement of Facts

Johnny Paul Penry was hired by Harold Stubblefield to deliver a freezer to the home of the deceased, Pamela Carpenter. Penry assisted with the delivery on October 9, 1979 (SF XIII

1351-65, 1377).

On October 25, 1979, between 9:00-9:30 a.m., the deceased spoke with her mother, Mrs. Rossie Moseley (SF XIII 1384). At about 10:00 a.m. she phoned a friend, Cindy Peters, and stated "This is Pam. I've been stabbed and raped. Mother's at the church. Help me and hurry." (SF XIII 1391-92, 1397-99, 1407). Peters went immediately to the deceased's residence and observed the deceased on her bed, covered with blood and moaning for help (SF XIII 1393, 1399-403). An ambulance was immediately called (SF XIII 1428-30).

Officer E. G. Page of the Livingston Police Department arrived on the scene at 10:26 a.m. (SF IV 255; XIII 1441), and spoke to the deceased (SF IV 253-54; XIII 1443), who told him her attacker was a white male, about twenty years old, short, thin with short, dark curly hair, and was wearing a plaid shirt, "possible flowers" and blue jeans (SF XIII 1446, 1449-50). The emergency technicians arrived soon thereafter to discover the deceased in a state of shock and bleeding (SF XIII 1481-85, XIV 1822).

The deceased received extensive emergency treatment in the hospital (SF XIII 1502-18). During the first hour, she was conscious and talking (SF XIII 1513-15, 1558). She stated that she had been stabbed with scissors and raped by a white male, short, thin with black hair. She stated that she had seen him before but did not know his name[3] (SF XIII 1524-26, 1558). The deceased's condition deteriorated and she died around noon during the emergency treatment. The cause of death was massive hemorrhage and the chest injury (SF XV 2081), which was consistent with having been stabbed with a pair of scissors (SF XIII 1519-20, 1563; XV 2077-79, 2094). The deceased also had a large bruise on her left side of her eye consistent with having been

[3]Her description given to Dr. McLendon was not admitted before the jury (SF XIII 1533).

struck by a fist, multiple bruises on her legs, a bruise on her throat consistent with hand strangulation, a bruise on the left rib cage about the size of a man's shoe heel, and a defensive wound on her hand (SF XIII 1506, 1557; XV 2063-81). Semen was observed on the genital area during the emergency treatment (SF XIII 1563-64); however, the deceased had extensive urinary tract hemorrhaging and no semen was found during the autopsy (SF XV 2082).

Deputy Sheriffs Billy Ray Nelson and Bob Grissom received a description of the assailant over the patrol car radio at approximately 11:00 a.m. (SF IV 136-37, 159-62, 173; XIV 1568-69, 1639-40). Nelson was familiar with Penry, who fit the dispatched description and had recently been released from the Texas Department of Corrections for rape (SF IV 138; XIV 1569). They proceeded to Penry's father's home, spoke with Penry and inquired of his whereabouts. Penry responded that he had been home about an hour (SF XIV 1570, 1639, 1641). The officers informed him that a girl had been possibly cut or stabbed and raped (SF IV 139-40; XIV 1572). Penry denied any knowledge (SF XIV 1570-72), but he agreed to accompany the officers to the police station[4] (SF IV 140; XIV 1573-75, 1594-95, 1643, 1656-57). No questions were asked on the way to the station (SF XIV 1586).

Within moments after their arrival, Ted Everitt, an investigator for the district attorney's office, advised Penry of his Miranda[5] rights off the standard police-issued card (SF IV 142, 145-47; XIV 1579, 1589, 1669-75). Penry did not request a lawyer (SF XIV 1589). At this time Officer Grissom noticed blood on the upper back shoulder of Penry's shirt and asked him about it. Penry responded that he had fallen on a stick while riding his bicycle earlier that morning. Because there was no tear in the

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[4]During the time at the Penry house, the officers never saw Penry's back (SF XIV 1572-76).

[5]Miranda v. Arizona, 384 U.S. 436 (1966).

shirt he was wearing, the officers asked him to show them the shirt he was wearing when the accident occurred. Penry responded that he'd be glad to and informed them the shirt was at his house (SF IV 142-44; XIV 1579-81, 1645-46, 1676-77). Miranda rights were again read in connection with Penry's signing a consent to search form at 12:10 p.m. (SF IV 144-47; XIV 1581-83, 1601-03, 1646, 1677-86; XVIII St.Ex. 7; XX St.Ex. 18).

The officers and Penry returned to the house and retrieved the shirt (SF IV 148-49; XIV 1604, 1646, 1686-88). Penry was then asked if he would accompany them to the crime scene and he agreed (SF IV 150; XIV 1604-05, 1648, 1689-90). Penry said, "I'll go with you, just don't try to pin anything on me I didn't do" (SF XIV 1648, 1690). The officer responded he wouldn't do that. At the deceased's house, Penry remained in the car unrestrained. After about thirty to forty minutes, Penry initiated a conversation by stating, "I want to tell you about it" (SF IV 151-52; XIV 1608-10, 1618). Officer Nelson testified, "I told him to just to be quiet. I didn't want to hear it. I told him to just shut up." Penry responded, "No, I want to get it off my conscience. I done it, and I want to get it off my conscience" (SF IV 151-52, 154; XIV 1618). Penry was placed under arrest (SF XIV 1625) and Officer Grissom then re-read Penry his Miranda rights (SF IV 153-54; XIV 1619-20, 1651-53). Penry then reiterated his desire to tell the truth (SF IV 154). Penry was taken into the house, where he described the crime, pointed out the scissors used to stab the deceased, and identified his pocketknife[6] (SF IV 154-55, 181-82; XIV 1620, 1723-24). He was subsequently searched, returned to the station (SF IV 181-82; XIV 1622, 1717-18), and turned over to Chief William F. Smith (SF XIV 1719).

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[6]The officer's description of Penry's actions at the crime scene was not admitted before the jury (SF XIV 1742).

A formal complaint was filed and an arrest warrant obtained (SF IV 252). Penry was taken before Judge Galloway for administration of magistrate's warnings on a charge of capital murder and they were twice read (SF IV 183, 203-12; XIV 1787-88, 1802-09, 1813-18). At the initial reading, Penry's father and step-mother appeared in court and "hollered not to sign it or make any statements" (SF IV 205). Penry's father read the magistrate's warnings to his son (SF IV 184; VI 537; XIV 1788-90, 1806, 1844) and when told he was charged with capital murder, Penry asked, "Did she die?" (SF IV 205; XIV 1815). Mr. Penry quit reading to his son and asked his son if he had committed the crime. Penry responded that he had. Mr. Penry, Sr., "stormed out of the office, out of the courtroom and told him he was through with him. He could go to jail as far as he was concerned" (SF IV 184-85; 205-07; XIV 1845). Penry subsequently signed the magistrate's warning in Judge Galloway's presence (SF IV 207).

Miranda warnings were again read and individually explained to Penry by Chief Smith at about 3:25 p.m. (SF IV 185-89, 200-01; XIV 1709, 1828-32, 1846-49; XV 1889-90). Penry then gave a confession which was reduced to writing (SF IV 185-89; XIV 1833-34, 1850). Smith knew that Penry could not read or write. The statement was read to him twice in its entirety including the warnings, with witnessing and signing by Penry occurring after the second reading at 6:05 p.m. on October 25, 1979 (SF IV 189-93, 214-15; XIV 1835-36, 1850-53, XV 1872-93, 1979).[7]

On October 26, 1979, Penry agreed to give hair samples, was again administered Miranda warnings, and signed a consent to search form (SF IV 195-96). On that date, Texas Ranger Maurice Cook again read and explained to Penry his Miranda warnings (SF IV 223-25; XV 1865, 1874-77, 1988-91). Penry gave a second

[7]This statement as it was presented to the jury appears in Vol. XV 1895-1902.

verbal confession, which was reduced to writing and read to him in its entirety, including the warnings. An addition was made by Penry and the statement was witnessed and signed (SF IV 227-32, 240-44; XV 1866, 1877-78, 1992-99, 2043-47, 2050-53).[8]

SUMMARY OF ARGUMENT

There are no special or important reasons to consider the questions presented.

The Texas capital-sentencing statute is constitutional. Because the special issues submitted to the jury on punishment are narrowly drawn so as to focus the jury's attention, and the defendant is allowed to present all relevant mitigating evidence for the jury's consideration in answering the special issues, there is no need for specific instructions on mitigating evidence.

Execution of a mentally retarded person does not violate the Constitution. Penry's low I.Q. notwithstanding, there is no question that he knows that he is to be executed and the reason why. No decision of this Court precludes the execution of a person of Penry's mental status.

There is no merit to Penry's challenge to the voluntariness of his confessions. Given the factual findings of the state courts, which were accepted by the federal habeas course, this claim must fail.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are

[8]This second statement appears in evidence at the guilt phase with reference to extraneous offenses removed (SF XV 1999, 2022-31).

special and important reasons therefor. Penry has advanced no special or important reason in this case, and none exists.

II.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Penry contends that the special issues a jury must answer in deciding punishment in a capital case are so narrowly drawn that, absent a specific instruction on how to consider mitigating evidence, the jury can be prevented from considering relevant mitigating evidence and from engaging in the type of individualized sentencing mandated by the Constitution. Because the trial court in his case gave no such instruction, he argues that the jury could have excluded relevant mitigating evidence from its punishment deliberations so that his resulting death sentence was unconstitutionally imposed.

A capital-sentencing statute must meet two requirements to pass constitutional scrutiny. First, the statute must be structured so that the death penalty is not imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 189 (1976). It must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Second, a capital-sentencing statute must provide for individualized sentencing by allowing the defendant to present evidence in mitigation of a sentence of death. Mandatory capital punishment statutes have been struck down because of their "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333 (1976); and sentences under guided-discretion statutes have been vacated when the sentencer was prevented from considering aspects of the defendant's character or record or the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586 (1978).

The Texas statute was found to satisfy both requirements in Jurek v. Texas, 428 U.S. 262 (1976). First, the offenses for which the state may seek to impose the death penalty are limited to intentional murders committed under strictly defined circumstances. Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). Once a defendant is found guilty of capital murder, a separate sentencing hearing is conducted to determine whether the punishment will be life imprisonment or death. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1987). Finally, all convictions that result in a sentence of death are automatically reviewed by the Texas Court of Criminal Appeals. Id., art. 37.071(f). The Texas statute was thus structured so as to prevent the sentencing authority from imposing a sentence of death in an arbitrary and unpredictable fashion. Jurek, 428 U.S. at 276. Penry does not challenge the validity of this aspect of the statute.

This Court also found that the Texas procedure provides for individualized sentencing. In Texas, after finding a defendant guilty of capital murder, the jury is not directly asked whether the punishment should be life imprisonment or death. Rather, the following set of special issues is submitted:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b). The jury must be persuaded beyond a reasonable doubt before a question may be answered affirmatively. If all of the issues submitted are answered "yes," the court sentences the defendant to death; otherwise, the sentence is life imprisonment.

In Jurek the Court noted that the special issues do not explicitly speak of mitigating circumstances. However, the Texas

Court of Criminal Appeals had interpreted the second question so as to allow the defendant to present to the jury whatever mitigating evidence he might wish:

> 'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look at the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.'

Jurek, 428 U.S. at 272, quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). The Texas statute puts before the jury "all possible relevant information about the individual defendant whose fate it must decide." Jurek, 428 U.S. at 276. In thus providing for individualized sentencing, Texas' procedure meets the requirements imposed by the Constitution.

Penry argues that the structure of the special issues might convince jurors that they are unable to consider certain evidence. He relies on certain statements in the opinion of the court below similar to those expressed by three dissenting members of the Texas Court of Criminal Appeals. In Stewart v. State, 686 S.W.2d 118, 125-26 (Tex.Crim.App. 1984), Judge Clinton, joined by Judges Teague and Miller, noted that evidence of mental illness and childhood deprivation could be introduced by the defendant as mitigating circumstances, but could also be viewed as weighing in favor of a death sentence. The dissent opined that the jury ought to be instructed by the trial court that the evidence had to be considered as mitigating. See also Johnson v. State, 691 S.W.2d 619, 627 (Tex.Crim.App. 1984) (Clinton, J., dissenting).

The minority members of the Court of Criminal Appeals themselves recognized, however, what this Court stated in Eddings v. Oklahoma, 455 U.S. 104 (1982): that evidence of difficult family history and of emotional disturbance is frequently

introduced by defendants in mitigation, and juries can easily grasp its significance. Eddings, 455 U.S. at 115. Although the sentencing authority cannot refuse to or be precluded from considering certain evidence as mitigating, nothing in the Constitution requires that it be considered only as mitigating. This much is evident from the Court's recognition in Enmund v. Florida, 458 U.S. 782 (1982), that, while a vicarious felony murderer may be executed in some states absent an intent to kill if sufficient aggravating factors are present, some of those same states make it a mitigating factor that the defendant was an accomplice to the murder and his own participation was relatively minor. Enmund, 458 U.S. at 791-92. It also follows from the requirement that the defendant be allowed to explain any evidence the state introduces in favor of the death sentence. Gardner v. Florida, 430 U.S. 349, 362 (1977). Like any circumstantial evidence, that introduced at the punishment phase of a capital murder trial can be susceptible of more than one interpretation. It is for the jury to determine the weight such evidence receives. See Eddings, 455 U.S. at 114-15 ("[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence"); Barclay v. Florida, 463 U.S. 939, 961 n. 2 (1983) (Stevens, J., concurring) (neither Lockett nor Eddings held that any particular weight must be given by the sentencer to mitigating evidence); Zant v. Stevens, 462 U.S. 862, 891 (1983) (Constitution does not require states to adopt specific standards for instructing jury how to consider aggravating and mitigating circumstances).

The Constitution requires the sentencer to listen to the defendant's mitigating evidence but does not usurp the sentencer's role in assessing the value of that evidence. Similarly, the Texas statute allows the defendant to submit to the jury whatever mitigating evidence he chooses to and requires the jury to consider that evidence in deciding punishment, but leaves to the jury the determination of what weight to give to it. See Cordova v. State, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (in

Texas, mitigating evidence is given effect by the influence it has on the jury during deliberations).

Penry also argues that the state convicting court erred in failing to define certain terms used in the special issues on punishment. The Fifth Circuit has consistently recognized that these words "are sufficiently common that their definition is not required in a jury charge under the capital murder statute." Milton v. Procunier, 744 F.2d 1091, 1095 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2040 (1985). The court's jury instructions on the punishment issues were not objectionable under Texas law or as a matter of federal constitutional law. Certainly, the instructions were not so defective as to render the punishment hearing as a whole fundamentally unfair. Cupp v. Naughten, 414 U.S. 141 (1973).

III.

EXECUTION OF A MENTALLY RETARDED PERSON DOES NOT CONSTITUTE AN EIGHTH AMENDMENT VIOLATION.

Penry contends that his execution would violate the eighth amendment proscription against cruel and unusual punishment because he is mentally retarded. In support of his claim, he argues that the Court's decision in Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595 (1986), precludes the execution of "idiots and lunatics." He asserts that execution of such persons offends contemporary notions of decency, citing to the American Association of Mental Deficiencies standards, a Florida survey and Texas' prohibition against the execution of persons who are under the chronological age of 17 when they commit the offense.

The evidence that Penry has limited mental capacity is not in dispute. As the district court found, psychological testing conducted on Penry from the age of eight through his 1980 trial places his IQ somewhere between 50-63, a range of moderage to mild mental retardation, and supports the district court's characterization of Penry as having "the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child (B. 4). Notwithstanding the evidence of Penry's

limited mental capacity, the district court denied habeas relief, reasoning primarily that "the [Constitution] does not proscribe [a death] sentence for the mentally deficient" and "the prohibition against execution of those unable to understand the reason for their punishment apparently does not apply to a person like Penry who has been adjudicated a competent man" (B. 5). The court below affirmed on the basis of well settled law of that circuit (A. 3).

The district court correctly found that prior to trial a comprehensive, separate competency hearing was held in state court (SF V-VII), and it presumed correct the jury's finding that Penry had sufficient present ability to consult with his lawyers with a rational degree of understanding and had a rational as well as factual understanding of the proceedings against him, or in other words, that he met the Texas standard for competence to stand trial. Tex. Code Crim. Proc. Ann. art. 46.02 §1(a) (Vernon 1981) (ROA 14; SF VII 944). See 28 U.S.C. § 2254(d); Maggio v. Fulford, 462 U.S. 111, 117 (1983). In addition, Penry raised an insanity defense at the guilt phase of his trial (SF XVI 2114-2321; XVII 2398-2422), and offered evidence of his diminished mental capacity to the jury for its consideration in the sentencing proceeding (SF XVII 2642-55). Both his guilt and punishment defenses were rejected by the trial jury, thus confirming the jury's belief that Penry knew right from wrong, was capable of conforming his conduct to the requirements of the law, committed the capital murder deliberately and with reasonable expectation of his victim's death, and constituted a future threat to society. Tex. Penal Code Ann. art. 8.01 (Vernon 1974); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

Penry's sole challenge is to the legal conclusion of the courts below that a defendant who has been adjudged competent at his trial does not qualify as an "idiot" under Ford. In fact, Ford itself does not support Penry's position. while the plurality opinion of four justices deferred developing standards for the enforcement of the constitutional restriction o the state's

execution of its sentences, Ford v. Wainwright, ___ U.S. at ___, 106 S.Ct. at 2606, the pivotal concurring opinion of Justice Powell states a "precise formula for determining what process is due." Johnson v. Cabana, 818 F.2d 333, 337 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 2207 (1987). As Johnson recognizes, Ford precludes the execution of a defendant who is unable "to perceive the connection between his crime and punishment." Id. at 336. Or in Justice Powell's terms: "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." ___ U.S. at ___, 106 S.Ct. at 2608-09.

Both the state courts and the federal habeas courts below found as a factual matter that Penry does not meet this standard. Thus, his argument is based on nothing more than disagreement with these factual findings, a matter clearly insufficient to warrant exercise of the Court's certiorari jurisdiction. The record clearly reveals that the courts below applied the correct constitutional standard in rejecting Penry's claim. The issues raised by Penry concern only the application of well-settled constitutional principles to his particular factual situation. This Court sits to decide important, novel or recurring questions, not to review evidentiary determinations founded on settled principles of law. Penry's claims do not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

IV.

PENRY'S CLAIM THAT HIS CONFESSIONS WERE INVOLUNTARY BECAUSE HE DID NOT KNOWINGLY RELINQUISH HIS RIGHT TO REMAIN SILENT IS MERITLESS IN LIGHT OF THE FACTUAL FINDINGS OF THE STATE COURTS.

Penry contends that both of his confessions should have been suppressed because they were made without a knowing relinquishment of his privilege against self-incrimination. The proper

standard of review for determining waiver was recently discussed by this Court in Moran v. Burbine, ___ U.S.___, ___, 106 S.Ct. 1135, 1141 (1986):

> Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), Miranda holds that "(t)he defendants may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444, 475, 85 S.Ct. at 1612, 1628. The inquiry has two distinct dimensions. Edwards v. Arizona, supra, 451 U.S. at 482, 101 S.Ct. at 1883; Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

The issue of voluntariness of a confession and waiver is a legal question requiring independent federal determination. Miller v. Fenton, ___ U.S. ___, ___, 106 S.Ct. 445, 450 (1986). The factual determinations subsidiary to the determination are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Id.

The first aspect of the test set forth in Burbine is that "the relinquishment must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." The trial court found that "from all the evidence that the Defendant was not induced or coerced by any person to give or make such written statement[s] by threats, persuasion, compulsion, intimidation, promises, unlawful detention, or anything else." (Tr. 94-95). The record evidence reflects more than fair support for the trial court's findings. The law enforcement authorities involved in the investigation and the witnesses to the signing each testified that no such inducements were given (SF IV 147, 217-18, 230-31,

243; XIV 1722, 1834; XV 1881, 1891, 1981, 2046). Penry testified at the competency hearing that there was no coercion or inducements (SF VI 533), and that he told the officers what to write (SF VI 543, 546-48). Until Penry admitted to having committed the crime, he was unrestrained and accompanied the officers of his own volition (SF IV 140-41, 144, 150-52, 156, 163, 175-78; XIV 1576, 1587-88, 1624-27, 1659).

It is undisputed that Penry initiated the conversation resulting in his first admission, over Officer Nelson's admonition to be quiet (SF IV 154; XIV 1608-10, 1618). See Moran v. Burbine, ___ U.S. at ___, 106 S.Ct. at 1141. When Penry made the oral statement confessing to the crime in the magistrate's courtroom it was in response to his father's questioning, not the law enforcement authorities (SF IV 184, 205-07; XIV 1845). Penry never invoked any of his rights. Further, the words in the confessions were Penry's, as he himself testified (SF VI 543). Any subtle coercion which might be present in police interrogation was simply absent here.

The second aspect of the test is the "awareness of the right being abandoned and the consequence of the decision to abandon it." The record does reflect, as Penry contends, that Penry is of low intellect and that his IQ falls in the mild-moderate mental retardation range. However, each of the persons who came in contact with Penry testified that at no time did he act in an emotional, bizarre or crazy manner; that he appeared to understand questions asked and responded in a rational manner; that they were able to understand and communicate with Penry; that Penry stated that he understood his rights; that he freely gave detailed information; and, that he had no trouble with recall (SF IV 157, 170, 189-90, 205, 226; XIV 1628, 1632-36, 1653, 1659, 1675, 1807-09, 1833, 1849, 1855; XV 1881, 1890, 1980, 1982-83, 1990-91, 1997, 2015, 2018, 2046).

The officers were aware that Penry was illiterate and recognized that he was a "little slow." His Miranda rights were not only read off the standard issued card, but explained

individually to him in simple terms numerous times prior to and during the giving of the statements (SF IV 165-67, 168-69, 183, 185, 190, 196, 203, 212, 223-26; VII 826-28; XV 1995, 2020, 1982, 1984-85). Penry's father, who certainly would be aware of his intellectual limitations, told Penry in the magistrate's courtroom not to sign the acknowledgement of rights form given to him by the magistrate. The magistrate informed the father that the rights had been read and that Penry said he understood. to this the father responded that Penry "can't write" and he then administered the warnings (SF IV 184, 205-07; XIV 1845). Finally, Penry stated he understood he was charged with capital murder and the consequences of those charges (SF VI 487, 490; VII 782, 785, 850). Psychiatric testimony indicated Penry had the capacity to understand Miranda warnings. The statements were read to Penry before signing in their entirety, including the warnings and waivers, slowly and carefully because Penry could not read (SF IV 190-92, 216-17, 228-30, 241-42). Express statements of waiver are contained in both.

The evidence underlying the state and federal courts' conclusions is not disputed in Penry's petition to this Court. His claim rests entirely on his assertion that "capital murder was [n]ever explained to him in terms he could understand [and] that he was [never] cautioned that signing the statement[s] could be used to give him the death penalty." (Petition at 20). This claim, however, is foreclosed by the Court's recent decision in Colorado v. Spring, ___ U.S. ___, 107 S.Ct. 851 (1987), wherein the Court rejected the proposition that the Constitution requires that a criminal suspect know and understand every possible consequence of a waiver of the fifth amendment privilege.

The totality of the circumstances reflect a non-coercive situation and express waivers of Penry's Miranda rights. While an express waiver "is not inevitably either necessary or sufficient to establish waiver," it is "usually strong proof of the validity of the waiver." North Carolina v. Butler, 441 U.S. 370, 373 (1979). This, coupled with the absence of deliberate means

calculated to break Penry's will, his desire to confess, the repeated and individualized administration of warnings, the explanation of rights in simple terms, and an ability on Penry's part to understand the proceedings and nature of his crime and the effect of confessing is more than sufficient to support the conclusion of the courts below that Penry knowingly relinquished his privilege against self-incrimination. Penry again asks the Court to review factual matters resolved against him by the courts below. To do so would be an unwarranted exercise of the Court's certiorari jurisdiction.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

87-6177

NO. _____

JOHNNY PAUL PENRY, PETITIONER	§	IN THE
V.	§	SUPREME COURT
JAMES A. LYNAUGH, RESPONDENT	§	OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED AS A PAUPER ON PETITION FOR WRIT OF CERTIORARI

Johnny Paul Penry, moves this court for leave to proceed as a pauper on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Attached to this motion is Petitioner's Affidavit in Support of Motion to Proceed in Forma Pauperis on Petition for Writ of Certiorari. Leave to proceed in forma pauperis was sought and granted in the trial court, Texas Court of Criminal Appeals, the United States District Court, Eastern District of Texas, Lufkin Division and in the United States Court of Appeals for the Fifth Circuit.

Attached to this Motion is Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Curtis C. Mason

CERTIFICATE OF SERVICE

I, Curtis C. Mason, Attorney for Respondent, do hereby certify that a true and correct copy of the above and foregoing Motion for Leave to Proceed as a Pauper on Petition for Writ of Certiorari, has been forwarded by United States Mail, postage prepaid, first class, to the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711 on this the 30th day of December, 1987.

Curtis C. Mason
Attorney for Respondent

NO._____

JOHNNY PAUL PENRY, PETITIONER	§	IN THE
V.	§	SUPREME COURT
JAMES A. LYNAUGH, RESPONDENT	§	OF THE UNITED STATES

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON PETITIONER FOR WRIT OF CERTIORARI

I, JOHNNY PAUL PENRY, being first duly sworn, depose and say that I am the Petitioner in the above styled cause; in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

   No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you have any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property?

   No.

5. List the persons who are dependant upon you for support and state your relationship to these persons.

   None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X Johnny P. Penry
JOHNNY PAUL PENRY

SUBSCRIBED AND SWORN TO before me on this the 28 day of December, 1987, to certify which witness my hand and seal of office.

NOTARY PUBLIC in and for
The State of Texas

My commission expires on:

_____